GAHC010153402023

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/231/2023

M K MASHIUDDIN AHMED
S/O LATE DR. HABIBULLAH, R/O WARD NO. 2, MANGALDAI TOWN, MOUZA CHAPAI, P.O. AND P.S.-MANGALDAI, DIST- DARRANG, ASSAM-784125

VERSUS

DR. GAZI GIASUDDIN AHMED
S/O LATE HABIBULLAH, PERMANENT ADD- WARD NO. 2, MANGALDOI TOWN, MOUZA CHAPAI, P.O. AND P.S.-MANGALDOI, DIST-DARRANG, ASSAM, PIN-.
PRESENT ADD- TRIBENI PATH, NEAR HOTEL ORIENTAL, DISPUR, GUWAHATI- DIST-KAMRUP (M), ASSAM

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

JUDGMENT & ORDER

Advocate for the petitioner : Shri A. Sattar, Advocate

Advocate for respondent : Shri S. Ali, Advocate.

Date of hearing : 02.08.2023

Date of judgment : 02.08.2023

1. Heard Shri A. Sattar, learned counsel for the petitioner whereas the respondent is represented by Shri S. Ali, the learned counsel.

2. Considering the subject matter and as agreed to by the learned counsel for the parties, this writ petition is taken up for disposal at the motion stage itself.

3. The petition has been filed under Article 227 of the Constitution of India in respect of an order dated 07.07.2023 passed by the learned Civil Judge, Darrang in Title Execution Case No. 05/2018 whereby the petition no. 1591 dated 22.06.2023 filed by the Decree Holder under Order XXI Rule 35 (3) read with Section 151 of the CPC has been allowed.

4. The fact projected in the petition is that Title Suit No. 15/1996 was filed by the elder brother of the present petitioner in which the petitioner was the defendant. The said Suit was for declaration of right, title, interest, recovery and injunction. The said suit was decreed in favour of the plaintiff and the said decree was upheld in appeal. The issue which has been sought to be raised by the present petitioner is with regard to identification of a particular part of the suit land. Attention of this Court has been drawn to a Report of the Circle Officer dated 17.03.2023 and another report of the Lat Mandal dated 05.03.2023 with regard to a structure measuring 16' X 10' with Tin roof having wooden posts and pucca floor and as per the aforesaid two Reports, such structure was not found to be existing. It is submitted that on 13.02.2023, the writ was issued.

5. Shri Sattar, the learned counsel for the petitioner has referred to the petition of the Decree Holder and has specifically drawn the attention of this Court to the prayer made in the said petition. The learned counsel submits that he is not opposed to the execution of the decree but he submits that such

execution has to be done after proper identification of the land and property in question. He submits that the impugned order dated 07.07.2023 has been passed without granting proper opportunity and without taking into consideration the relevant materials. It is accordingly prayed that necessary interference be made with the said order dated 07.07.2023.

6. *Per contra*, Shri S. Ali, the learned counsel for the respondent has submitted at the outset that the present attempt of filing this petition lacks *bona fide* as the plaintiff who had successfully instituted the suit in the year 1996 is yet to get the fruits of the decree passed in the suit. He submits that the present petitioner was unsuccessful in the Trial Court, First Appellate Court, Second Appellate Court and even in the Hon'ble Supreme Court and thereafter, the present attempt has been made only to cause further delay and thereby frustrate the decree. He has also informed that on an earlier occasion a revision petition was filed in this Court which was also dismissed.

7. Replying on the merits of the case, Shri Ali, the learned counsel has submitted that there is no confusion at all with regard to the land in question as the same is covered by boundary walls. By drawing the attention of this Court to Schedule V which also contains a sketch map of the land in question, it is submitted that the total area of the land is 1 bigha, 2 katha, 10 lessas and as per a family arrangement, 2 katha 10 lessas was given to the defendant. He has submitted that the entire plot is covered by the points ABCD out of which the portion of 2 K 10 L given to the defendant is covered by points EBCF. He submits that since the defendant did not have a dwelling house, in the portion of the land belonging to the plaintiff, a temporary structure of 16'X10' was allowed to be constructed wherein the defendant was allowed to reside. The learned counsel clarifies that in course of his profession, the petitioner used to

reside at Guwahati most of the times. He submits that the suit which was instituted in the year 1996 had culminated in the decree which was also affirmed by the highest Court as observed above and even after 29 years of such institution, the fruits of the decree is yet to be enjoyed by the plaintiff.

8. Shri Ali, the learned counsel further submits that in the written statement filed by the present petitioner as defendant, there was no denial at all with the aforesaid fact of existence of a temporary structure as mentioned above in the portion of the land covered by points A,E,F,D measuring 1 Bigha belonging to the respondent/plaintiff. He accordingly submits that the present petition is an abuse of the process with the intention to further delay the matter.

9. In support of his submissions, Shri Ali, the learned counsel has relied upon the following decisions:

1. ***B. Gangadhar vs. B.G. Rajalingam*** [***(1995) 5 SCC 238***]

2. ***Brakewel Automotive Components (India) Private Limited vs. P.R. Selvam Alagappan*** [***(2017) 5 SCC 371***]

3. ***Mohd.Ismail vs. Ashiq Husain [AIR 1970 ALL 648].***

4. ***Mst. Gheodhari Kuer and Ors. [AIR 1980 Patna 197].***

10. In the case of ***B. Gangadhar*** (supra), the Hon'ble Supreme Court by discussing Order 21 Rule 35 (3) of the CPC has laid down as follows:

> "*8. Rule 35(3) of Order 21 itself manifests that when a decree for possession of immovable property was granted and delivery of possession was directed to*

be done, the court executing the decree is entitled to pass such orders incidental, ancillary or necessary orders for effective enforcement of the decree for possession. That power also includes the power to remove any obstruction or superstructure made pendente lite. The exercise of incidental, ancillary or inherent power is consequential to deliver possession of the property in execution of the decree. No doubt, the decree does not contain a mandatory injunction for demolition. But when the decree for possession had become final and the judgment-debtor or a person interested or claiming right through the judgment-debtor has taken law in his hands and made any constructions on the property pending suit, the decree-holder is not bound by any such construction. The relief of mandatory injunction, therefore, is consequential to or necessary for effectuation of the decree for possession. It is not necessary to file a separate suit when the construction was made pending suit without permission of the court. Otherwise, the decree becomes inexecutable driving the plaintiff again for another round of litigation which the code expressly prohibits such multiplicity of proceedings."

11. In the case of ***Brakewel Automotive*** (supra), it has been laid down that a decree of a court is sacrosanct in nature and the execution thereof cannot be thwarted. For ready reference, the relevant paragraphs of the said decision are extracted herein below:

"***20.*** *It is no longer res integra that an executing court can neither travel behind the decree nor sit in appeal over the same or pass any order jeopardising the rights of the parties thereunder. It is only in the limited cases where the decree is by a court lacking inherent jurisdiction or is a nullity that the same is rendered non est and is thus unexecutable. An erroneous decree cannot be equalled with one which is a nullity. There are no intervening developments as well to render the decree unexecutable.*

21. *As it is, Section 47 of the Code mandates determination by an executing court, questions arising between the parties or their representatives relating to the execution, discharge or satisfaction of the decree and does not contemplate any adjudication beyond the same. A decree of court of law being sacrosanct in nature, the execution thereof ought not to be thwarted on mere asking and on untenable and purported grounds having no bearing on the validity or the executability thereof.*

22. *Judicial precedents to the effect that the purview of scrutiny under Section*

47 of the Code qua a decree is limited to objections to its executability on the ground of jurisdictional infirmity or voidness are plethoric. This Court, amongst others in Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman5 in essence enunciated that only a decree which is a nullity can be the subject-matter of objection under Section 47 of the Code and not one which is erroneous either in law or on facts. The following extract from this decision seems apt: (SCC pp. 672-73, paras 6-7)

"6. A court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representative on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction."

***23.** Though this view has echoed time out of number in similar pronouncements of this Court, in Dhurandhar Prasad Singh v. Jai Prakash University, while dwelling on the scope of Section 47 of the Code, it was ruled that the powers of the court thereunder are quite different and much narrower than those in appeal/revision or review. It was reiterated that the exercise of power under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an executing court can allow objection to the executability of the decree if it is found that the same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree unexecutable after its passing. None of the above eventualities as recognised in law for rendering a decree unexecutable, exists in the case in hand. For obvious reasons, we do not wish to burden this adjudication by multiplying the decisions favouring the same view.*

***24.** Having regard to the contextual facts and the objections raised by the respondent, we are of the unhesitant opinion that no case has been made out*

to entertain the remonstrances against the decree or the application under Section 47 CPC. Both the executing court and the High Court, in our comprehension, have not only erred in construing the scope and ambit of scrutiny under Section 47 CPC, but have also overlooked the fact that the decree does not suffer either from any jurisdictional error or is otherwise invalid in law. The objections to the execution petition as well as to the application under Section 47 CPC filed by the respondent do not either disclose any substantial defence to the decree or testify the same to be suffering from any jurisdictional infirmity or invalidity. These are therefore rejected."

12. In the case of ***Mohd. Ismail*** (supra), the Hon'ble Allahabad High Court has held that by applying the rules of equity, a defendant cannot take advantage by making any constructions over the suit land after passing of the decree as the plaintiff is not required to institute a new suit in which case, the litigation would never come to an end.

13. A division bench of the Hon'ble Patna High Court in the case of ***Ramrup Rai*** (supra) on the aforesaid issue has laid down as follows:

"*8. Now I proceed to consider the main question as to whether the courts below should have ordered for removal of the structures in course of effecting the delivery of possession of the land in question.*

The relevant provision is contained in Rule 35 of Order 21 which deals with the modes of executing a decree for possession of immovable properties. The Court of appeal below has noticed some cases on the point but all those cases are between a landlord and tenant and, in my view, the principle laid down in those cases will not apply to a situation in the case before use. The only question that has to be decided is as to whether while executing a decree for recovery of possession of the vacant land the executing court can direct for removing the structures. Such structures may be put up by a judgment-debtor, (1) before the institution of the suit, (2) pendent lite, and (3) after the decree. In their objection petition the judgment-debtors had pleaded that the constructions in question were put by them must before the suit. The decree-holder in his rejoinder, however, controverted this position and contended that

the structures were put up after the passing of the decree. There is no express finding on this question by either for the courts below. As already seen, the proceeded entirely from a different angle to answer this question. It cannot be disputed that where the defendant puts up construction pendent lite or after the passing of the decree, then the executing Court can order demolition of the structures and deliver vacant possession. But where the constructions are put up before the institution of the suit, the executing court cannot order demolition of the structures, but would simply deliver possession of the land and the buildings after removal; of the judgment-debtor therefrom. In either case, however, the court may before ordering delivery of possession give time to the judgment-debtor to remove himself the materials, if he so liked. The judgment-debors' claim of the structures being in existence from before the institution of the suit was controverted by the decree-holder and both the sides examined several witnesses in support of their respective stand. The executing court has not discussed the oral evidence on this point, but it appears from para 9 of its order that with reference to the said evidence on this point, but it appears from para 9 of its order that with reference to the said evidence as well as the judgment of the title suit itself, it came to the concludion that some structures existed on the suit land from before. To that view of the matter, the executing Court did not think it proper to order for removal of the structures and has further held that after delivery of possession was effected in his favour, it was for the decree holder to consider as to whet he shall do with the structures in question.

9. From a perusal of para 7 of the Order of the lower appellate court, however, I find that it has come to a conclusion that two Docharas were constructed by the judgment-debtors during the pendency of the suit, although some other structures were already there from before. The decree-holder has prayed for delivering vacant possession over the lands on demolishing the two Docharas only, which according to the above finding were constructed pendent lite. In that view of the matter, I will allow this appeal and direct the executing court for giving possession of the land after removal or demolition, as the case may be, of the two Docharas. With respect to the constructions, if any, already on the land from before, it would simply allow some reasonable time to the judgment-debtors to remove the materials of the said structures. I find support for this view from the case of Mohd. Ismail vs. Ashiq Husain,."

14. Shri Ali, the learned counsel has finally submitted that there being no dispute with regard to the identification of the land which was bounded by brick walls and there being no denial in the written statement regarding existence of the house in the Schedule V of the plaint, there is absolutely no instance made

out requiring any interference with the order passed order dated 07.07.2023. By citing the aforesaid case laws, it is submitted that any change brought in *pendente lite* or even after passing of the decree is not required to be challenged in a separate suit and the Executing Court has adequate powers to execute the decree in its letter and spirit.

15. Rejoining his submissions, Shri Sattar, the learned counsel for the petitioner has drawn the attention of this Court to a reply dated 10.01.2022 obtained under the Right to Information Act regarding the house in question.

16. The rival submission made by the learned counsel for the parties have been duly considered and the materials placed before this Court have been carefully examined. The suit which was executed in the year 1996 and was decreed in favour of the plaintiff had attained its finality as all appeals including one before the Hon'ble Supreme Court preferred by the defendant have been dismissed. Schedule V of the plaint which has been reproduced in the decree clearly reflects that out of a total area of 1 B 2 K 10 L covered by points A,B,C, D, an area of 2 K 10 L carved out of the total area and covered by points E,D,C & F was given to the defendant and thereby an area of 1 B was retained by the plaintiff-respondent. The fact that the temporary structure of 16' X 10' was existing within the point A, E, F & B has not been disputed by the petitioner. Though Shri Sattar, the learned counsel for the petitioner has submitted that the impugned order was passed on 07.07.2023 without affording an opportunity of filing objection, on a specific query made by this Court with regard to any such pleadings to the effect that the present structure is not existing within the point A,E,F & D nothing has been able to be shown even from the present petition.

17. For better understanding, the sketch of the land involved is extracted herein below:

SCHEDULE-V (Description of the house from which the defendant No. 1 is sought to be evicted)

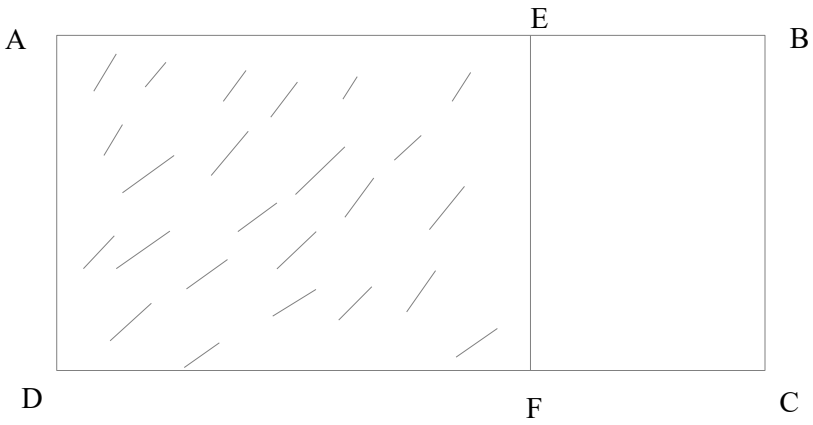
A one-roomed Assam type dwelling house, Asbestos roof, wooden frame and posts, pucca floor measuring approximately 16' X 10' towards the eastern side of the main house covered by Holding No. 237, Ward No. 2, Mangaldai Town.

Site Plan

North

West East

South



18. This Court has also noticed that the descriptions of the house from which the defendant was sought to be evicted as mentioned in Schedule V has not been denied in the written statement or at any subsequent stage.

19. This Court is also guided by the law laid down by the Hon'ble Supreme Court as discussed above that the Executing Court can exercise incidental powers and remove any structure made *pendente lite* to execute the decree in its letter and spirit. This Court is also of the view that the information which has been sought to be obtained long after the decree was passed under the Right to Information Act would not be relevant in the adjudication of the present list.

20. Under those facts and circumstances, this Court is of the opinion that the order dated 07.07.2023 impugned in this proceedings does not suffer from any infirmity which call for interference by this Court. In any event, the powers of revision to be exercised by this Court is circumscribed and is dependant upon certain conditions which are broadly given as follows:

i. When the Subordinate Court exercises jurisdiction not vested by law.

ii. When there is a failure to exercise a jurisdiction vested by law.

iii. When there is exercise of jurisdiction illegally or with material irregularity.

The amendment to the Code of Civil Procedure of the year 1999 has added a further restriction that such powers should not be exercised by the High Court except where the order if made in favour of the party applying of the revision would have finally disposed of the suit or other proceedings. It is perhaps of the restrictions imposed by the amendment that petitions are being filed under Article 227 of the Constitution of India.

21. It is however a settled law that powers of revision are supervisory in nature. The power of revision is mainly to keep the Subordinate Courts within the bounds of their jurisdiction. The Hon'ble Supreme Court in the case of ***Rafat Ali v. Sugni Bai, reported in (1999) 1 SCC 133*** has laid down as follows:

> "***8.*** *The appellation given to the section makes it unmistakably clear that the power conferred thereunder is revisional which means, it is a power of supervision. It is well-nigh settled that a revisional jurisdiction cannot be equated with appeal powers in all its parameters. The power to call for and examine the records is for the purpose of the High Court to satisfy itself as to the "legality, regularity or propriety" of the order of the lower authority. Even such a widely-worded frame of the section may at best indicate that the revisional powers are not so restricted as in the enactments wherein the words are not so widely framed. Nonetheless, they remain in the realm of supervisory jurisdiction…"*

22. In view of the above, this Court is of the unhesitant opinion that the instant petition is devoid of merits and accordingly the same is dismissed.

JUDGE

Comparing Assistant